EXHIBIT A

1   IN THE UNITED STATES DISTRICT COURT

2   FOR THE DISTRICT OF DELAWARE

3   _____

4   DATACORE SOFTWARE CORPORATION,

5   Plaintiff,

6   v.   C.A. No.

7   SCALE COMPUTING, INC.,   22-535-GBW-SRF

8   Defendant.

9   _____

10   VIDEOCONFERENCE HEARING

11   DATE: Wednesday, November 29, 2023

12   TIME: 12:11 p.m.

13   BEFORE: Honorable Sherry Fallon

14   LOCATION: J. Caleb Boggs Federal Building

15   844 North King Street

16   Unit 14, Room 6100

17   Wilmington, DE 19801

18   REPORTED BY: Andrew Weader

19   JOB NO.:   6322712

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1   A P P E A R A N C E S

2 ON BEHALF OF PLAINTIFF DATACORE SOFTWARE CORPORATION:

3   JODI BENASSI, ESQUIRE (by videoconference)

4   ETHAN TOWNSEND, ESQUIRE (by videoconference)

5   McDermott Will & Emery, LLP

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11 ON BEHALF OF DEFENDANT SCALE COMPUTING, INC.:

12   TALIN GORDINA, ESQUIRE (by videoconference)

13   Wilson Sonsini Goodrich & Rosati, P.C.

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15   Los Angeles, CA 90067

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1   A P P E A R A N C E S (Cont'd)

2 ON BEHALF OF DEFENDANT SCALE COMPUTING, INC.:

3   BINDU PALAPURA, ESQUIRE (by videoconference)

4   Potter Anderson & Corroon, LLP

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1   E X H I B I T S

2 NO.   DESCRIPTION   ID/EVD

3 Plaintiff:

4   (None marked.)

5

6 NO.   DESCRIPTION   ID/EVD

7 Defendant:

8   (None marked.)

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1   P R O C E E D I N G S

2   THE COURT: All right. This is the

3 matter in Datacore vs. Scale. It's docket number

4 22-535. It's the time that that the Court has set

5 aside for a discovery dispute teleconference.

6   Since we're off to a bit of a late

7 start, Counsel will need to condense their arguments.

8 I had set aside an hour for this teleconference, so I

9 expect to be concluded by one so that I can attend to

10 other matters on the Court calendar.

11   With that, let's start with appearances

12 of counsel. First, for the plaintiff, Datacore.

13   MR. TOWNSEND: Good afternoon, Your

14 Honor. This is Ethan Townsend from the Delaware

15 office of McDermott Will & Emery on behalf of the

16 plaintiff. With me on the line is my colleague from

17 San Francisco, Jodi Benassi. Ms. Benassi will be

18 presenting to the Court today with the Court's

19 permission.

20   THE COURT: Very well. Thank you.

21   And who was on the line for Scale

22 Computing? I know Ms. Palapura is. If you'd like to

23 introduce the others on the line, you may do so now.

24   MS. PALAPURA: Good afternoon, Your

2 (Pages 2 - 5)

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1 Honor. Bindu Palapura from Potter on behalf of
2 Defendant Scale. And with me today is Talin Gordina
3 from Wilson Sonsini Goodrich & Rosati. Ms. Gordina is
4 going to be handling the arguments this afternoon.
5   THE COURT: Okay. Thank you for that.
6   I have read the materials that have
7 been submitted and I am prepared to go forward. And I
8 think, Counsel, I think there were two issues that
9 have been resolved prior to today's conference. We'll
10 go forward, unless I hear otherwise that said other
11 issues have been resolved, we'll go forward with
12 Datacore's Motion to Compel --
13   I'd like to start with the Motion for
14 Relief in the form of precluding Scale from relying on
15 documents produced after the document discovery
16 deadline of August 31.
17   And specifically, I'd like to hear from
18 Datacore how weighing the Pennypack factors tips in
19 favor of this substantial relief that Datacore is
20 seeking.
21   MS. BENASSI: Thank you, Your Honor.
22 This is Jodi Benassi from McDermott Will & Emery for
23 the plaintiff.
24   Your Honor, Scale has been operating on

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1 its own discovery timeline in this case and has
2 completely ignored this Court's schedule and the
3 rules. They've made 12 document productions past the
4 deadlines in the scheduling order, and these
5 productions have represented over 99 percent of their
6 total documents produced in this case.
7   Datacore has been harmed by these
8 untimely productions. First, Datacore did not have an
9 opportunity to review and analyze the bulk of Scale's
10 documents before it served its 30(b)(6) Deposition
11 Notice on Scale. And second, Datacore was unable --
12   THE COURT: Let me interrupt there.
13 And I'm sorry, I know it's difficult on these calls.
14 But I want to make sure I'm precisely understanding
15 your argument, because I'm hearing a different story
16 from Scale. I'm sure you've read their response.
17   When you say that this is 99 percent of
18 their production was belated, they're telling me that,
19 you know, slightly over 5,100 documents were produced,
20 I guess, between the document production deadline and
21 September 18. And then a few more came in in November
22 after I ruled on one of the prior discovery disputes.
23 You're telling me 99 percent of their document
24 production is a belated or late untimely production?

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1   And also I want the date on which you
2 served your 30(b)(6) Deposition Notice on behalf of
3 Datacore. I didn't see the date mentioned and I
4 didn't look that closely at the docket to find it.
5   MS. BENASSI: Sure, Your Honor. I'd be
6 happy to provide that. The date that we provided the
7 Deposition Notice was on July 27, 2023.
8   And with respect to Scale's document
9 production for clarity, they produced 151,074
10 documents in productions between June 1 and the close
11 of fact discovery. So that was after the deadline for
12 substantial document completion and close of fact
13 discovery. Prior to June 1, they had produced 499
14 documents. After close of fact discovery on August
15 31st, they produced an additional 5,127 documents.
16   THE COURT: Okay. Thank you. So your
17 30(b)(6) notice was issued in July, roughly a little
18 over a month before the close of fact discovery, is
19 that correct?
20   MS. BENASSI: That's correct.
21   THE COURT: And then the bulk of these
22 documents came in as of September 18th, albeit if a
23 portion, a significant portion of them, were untimely
24 in Datacore's view. Is that right?

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1   MS. BENASSI: That's correct. And just
2 to be clear again, the biggest production, which was
3 137,172 documents, which equated to 267,466 pages,
4 occurred on August 19, which was 10 days before the
5 close of fact discovery. No other production had been
6 near that size. And then it was in September that
7 we --
8   THE COURT: So let me stop you there.
9 Maybe easier to get through since we have limited time
10 on this call. So you nonetheless had, I'll call it, a
11 document dump for purposes of our discussion, in
12 August, like, 10 days or so before the close of fact
13 discovery. And at that time, the 30(b)(6) Deposition
14 Notice had already issued, correct?
15   MS. BENASSI: That's correct.
16   THE COURT: And adjustments had to be
17 made in light of wrapping in those documents that were
18 produced on the eve of fact discovery closing if they
19 were going to be useful in this 30(b)(6) deposition
20 and/or other fact witness depositions. Is that right?
21   MS. BENASSI: That's right, Your Honor.
22 And we had at the time all of Scale's 30(b)(6)
23 depositions scheduled to happen in September, so we
24 were scrambling.

3 (Pages 6 - 9)

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1   THE COURT: Then the parties did make
2   adjustments to push them out to November. And it's my
3   understanding one of the reasons it was pushed out by
4   two months at that time was because Datacore's legal
5   team had other unrelated matters and/or trials that it
6   was preoccupied with and could not push these
7   depositions out by just a month. Is that right?
8   MS. BENASSI: That's correct. But I'll
9   point out a nuance to that. In August and through the
10   beginning of September, the parties were moving
11   forward with us taking Scale's 30(b)(6) depositions in
12   September. And so we were working through those
13   documents as quickly as we could.
14   And then the two subsequent productions
15   happened without any warning at all. And you know,
16   that was almost 30,000 documents that got produced.
17   Actually, it was over 30,000.
18   And so it wasn't until after September
19   18th that we had asked Scale for second depositions of
20   their witnesses, and they refused. And we had no
21   alternative at that point but to agree to move the
22   depositions to November.
23   And you're correct, through the month
24   of October, Datacore's lead counsel in the case was at

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1   trial in another matter.
2   And so all of the depositions in this
3   case have happened in November, which has further
4   prejudiced Datacore's expert's ability to write their
5   expert reports, which are due next Friday.
6   So our last deposition is happening
7   tomorrow, and then there's eight days until our expert
8   reports are due. And having everything happening in
9   November has really prejudiced Datacore.
10   THE COURT: Well, after reviewing the
11   documents, you didn't go back and amend your 30(b)(6)
12   Deposition Notice before proceeding with the bulk of
13   these fact depositions in November, correct?
14   MS. BENASSI: Correct.
15   THE COURT: You have essentially taken
16   all the depositions, all the fact depositions that
17   needed to be taken within this timeframe except for
18   one. There's one final one that you say is going
19   forward did you say tomorrow, is that right?
20   MS. BENASSI: That's correct, Your
21   Honor. There's an additional fact witness who's being
22   deposed tomorrow.
23   THE COURT: All right. So your expert
24   theoretically then has all these transcripts of all

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1   the other witnesses since the time that the
2   depositions were taken earlier in the month and has
3   had the ability to go through those, except for this
4   one that's being taken tomorrow, correct?
5   MS. BENASSI: He has copies. Our
6   experts have copies of all of the transcripts,
7   correct.
8   THE COURT: And there's nothing
9   specific in your letter briefing, unless I've
10   overlooked it. And if I have, please feel free to
11   correct me. I don't presume to have all of these
12   arguments in every line in the letter briefing
13   committed to memory. But I didn't see anything in the
14   letter briefing about how your expert is hindered in
15   any way shape or form from producing an opening report
16   within the deadline set currently by this current
17   scheduling order.
18   MS. BENASSI: Well, Your Honor, one of
19   the issues is Datacore has not had the time to analyze
20   the over 5,000 documents that have been produced by
21   Scale after the close of fact discovery. So we don't
22   know the extent of what's in those documents. So that
23   has severely prejudiced Datacore.
24   And then in turn, the fact that we

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1   haven't had a chance to review all of those documents
2   prejudices Datacore's experts.
3   THE COURT: Yeah, but you're not
4   showing -- I mean, you're making an argument in
5   conclusory terms that there's prejudice, but you're
6   not showing me how. The parties have adjusted.
7   And let me preface this by saying, you
8   know, and I'll discuss this with Scale, that the Court
9   disfavors document dumps that are made either on the
10   eve of discovery closing or belatedly shortly
11   thereafter. That is not the way discovery should be
12   handled in the case.
13   Nonetheless, when looking at the
14   Pennypack factors, it's not a black and white all or
15   nothing result. It doesn't automatically result in a
16   preclusion. The document dump is only one part of the
17   analysis. In analyzing prejudice, prejudice has to be
18   shown.
19   I need to see just exactly where the
20   prejudice is and how mitigating or attempting to cure
21   that prejudice is going to have a domino effect in
22   terms of upending the rest of the case, in terms of
23   the schedule and going forward with it.
24   And that's not in this letter briefing

4 (Pages 10 - 13)

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1 record unless I'm missing it. Can you show me where
2 that is?
3   MS. BENASSI: Not at the moment. But
4 what I can say in terms of prejudice that I think is
5 throughout the letter brief is that we, Datacore, has
6 not had an opportunity to analyze the 5,100 documents.
7 And because of that, we weren't able to ask Scale's
8 witnesses questions about those 5,100 documents.
9   I mean, there's certain documents we
10 were able to get to, but we couldn't get through
11 everything. And that's the prejudice here.
12   THE COURT: You've had 5,100 documents,
13 as I understand it, since September 18th, well over
14 two months now. Am I mistaken?
15   MS. BENASSI: No, you're correct in
16 terms of the timing, but it's the nuances, what's
17 happened in terms of the timing.
18   So in the month of September, we were
19 ramped up in August with the full discovery team to
20 review documents and getting ready for depositions in
21 September. That team wound down.
22   And so we're in the middle of preparing
23 for all of these depositions, preparing our witnesses,
24 preparing deposition outlines, and then we get two

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1 additional document productions.
2   We didn't have time to turn to those
3 documents and fully analyze them by the time we were
4 getting ready for the 30(b)(6) depositions that were
5 happening in September.
6   Then in October, the core team left,
7 went off to another trial and didn't come back until
8 November. By the time November hit, it was
9 back-to-back depositions. Every single day
10 practically in the month of November has been a
11 deposition.
12   So either we're taking a deposition or
13 we've been preparing our witnesses for depositions,
14 there's been zero time to go back and review the
15 documents.
16   THE COURT: Have you thought about some
17 interim remedy short of precluding the use of these
18 documents throughout the remainder of the litigation?
19   MS. BENASSI: We have, Your Honor. We
20 thought about that in advance of today's hearing. And
21 you know, we think, you know, if we were given until,
22 let's say, you know, a week or so after the rebuttal
23 reports. And our rebuttal reports right now are due
24 on January 15th, maybe a week or two before that.

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1   We think we'll have time to go through
2 and identify any issues in the documents. And I think
3 potentially we could take a deposition before the
4 rebuttal report. That might be possible.
5   THE COURT: What deposition are you
6 envisioning taking before the rebuttal expert report?
7   MS. BENASSI: We don't know because we
8 don't know what's in the documents.
9   THE COURT: All right. Well, that
10 explains the -- and I think I don't need to ask my
11 next question. Which is, what is the scope, topics,
12 timeframe, and amount of time needed for this related
13 relief of seeking an additional 30(b)(6) deposition?
14 You're not in a position I'm assuming to respond to
15 that inquiry?
16   MS. BENASSI: That's correct, Your
17 Honor.
18   THE COURT: All right. Anything
19 further before I hear from Scale on this issue?
20   MS. BENASSI: I would -- no, given the
21 time, I'll rest on that.
22   THE COURT: Very well. Thank you.
23   Ms. Gordina, I'll hear from you on
24 behalf of Scale.

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1   MS. GORDINA: Good afternoon, Your
2 Honor. Thank you for the opportunity.
3   Your Honor, you focused in on the key
4 issue here, which is the prejudice. There is none,
5 because as the record reflects, these 5,000 or so
6 documents have been in the possession of Datacore for
7 over two months.
8   And based on their own representations
9 to us about the contents of those documents, it seemed
10 to us that they had reviewed them, and they asked
11 questions about those documents of our witnesses at
12 their depositions in November.
13   So Ms. Benassi's representation that
14 they have not reviewed those 5,000 documents in the
15 last two, two plus months, it's surprising because it
16 contradicts what the record shows to us.
17   We are not prepared to discuss another
18 30(b)(6) deposition after the rebuttal report. This
19 is the first time Datacore's Counsel has raised that
20 issue. So we have not met and conferred about that.
21 But it's difficult to see how that would remedy
22 anything here when there is no prejudice.
23   It's important to also understand what
24 those documents are. In the course of preparing our

5 (Pages 14 - 17)

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1 witnesses for their depositions, we identified these
2 documents that had been withheld because of privilege.
3 We realized that they were inadvertently withheld. We
4 had our reviewers look through them again and we
5 believed that the right thing to do was to produce
6 them as soon as we understood that they had been
7 inadvertently withheld. So we produced them within
8 about two weeks of the close of fact discovery.
9   Ms. Benassi failed to mention that
10 Datacore produced 90 percent of their documents within
11 the last 10 days of the fact discovery period. By the
12 June 1st substantial completion deadline, Datacore had
13 produced less than 70 documents.
14   So the discussion of what occurred
15 prior to the close of fact discovery, that seems a
16 little bit of a unrelated or tangential discussion
17 here, that I think the focus really needs to be on
18 these 5,000 documents. A few hundred of which were
19 documents that Datacore already had. These were
20 emails between the parties.
21   So as you said, it's hard to see where
22 there is any prejudice when Datacore has had these
23 documents for over two months, has reviewed them, and
24 has even questioned our witnesses about those

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1 documents at their deposition.
2   So the extreme sanction of excluding
3 these documents, we don't see how that can be
4 warranted by the balancing of the Pennypack factors
5 when there's clearly no prejudice to Datacore.
6   I'll stop there, Your Honor, and see if
7 you have any questions just in interest of time.
8   THE COURT: Thank you, but I don't have
9 anything additional at this time.
10   Except that, well, let me just ask.
11 You said of those 5,100 or so documents that were
12 produced, and they were produced late because some of
13 them were thought to be privileged, you know, I guess
14 I'm finding it difficult to understand that. I mean,
15 the parties have been in this litigation for some
16 time. And I'm sure your team is well aware, not just
17 in this litigation, but in all cases like this,
18 similar to this, the Court disfavors document dumps.
19   How were these produced? Were they
20 produced all at once, were they produced on a rolling
21 basis? Did you have any discussion giving Datacore a
22 heads up that these were coming and to assist them
23 with the rather large task of going through what is
24 essentially a document dump at an inopportune time?

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1   Did you give them any assistance with
2 that in terms of what you were producing, why you were
3 producing it late, how you were producing it, maybe on
4 a rolling basis to ease the burden of going through
5 it? Can you tell me what you did to assist them in
6 light of the fact that you're dumping 5,100 documents
7 on them at a very inopportune time in the litigation?
8   MS. GORDINA: Your Honor, we did do it
9 on a rolling basis. There were two productions, one
10 on September 13th and one on September 18th.
11   In terms of a notification, my
12 understanding there was no email notifying them that
13 this was coming. As soon as we realized what had
14 happened, we were busy reviewing the documents, making
15 sure that our vendor was getting them ready for
16 production. So the answer is we didn't provide them
17 any notice, but the production was made on a rolling
18 basis. Half of it came on the 13th and about just
19 over half of it on the 18th.
20   In terms of the -- well, I'll stop
21 there. I just wanted to answer your question.
22   THE COURT: All right. And in terms of
23 the interim relief that they suggested, that once
24 they're fully able to absorb and review all of these

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1 documents, and if it is determined that it would be
2 helpful to have an additional 30(b)(6) deposition, and
3 they propose doing it before rebuttal expert reports
4 are due, what is Scale's position on that other
5 alternative form of relief?
6   MS. GORDINA: Well, Your Honor, again,
7 it's the first time we're hearing this, and we don't
8 have enough details about what Datacore is
9 contemplating in terms of who the witnesses are or
10 what the questioning will be.
11   I think the problem there is having a
12 deposition in the middle of expert reports can sort of
13 upend the schedule as well. It may have impacts on
14 previously served expert reports.
15   So it's hard to imagine what that will
16 look like without knowing more, about specifically
17 what Datacore is hoping to get out of that deposition
18 that they have not already gotten out of. They've
19 deposed 10 Scale witnesses by the end of this month.
20 And so it's unclear what in those 5,000 documents they
21 believe they still need to question our witnesses on.
22   As we mentioned in our opposition
23 letter, they have actually asked questions of our
24 30(b)(6) witnesses about those documents. And it's,

6 (Pages 18 - 21)

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1 again, what I'm hearing Ms. Benassi say today is
2 contradicted by the record. The fact that they
3 allegedly haven't reviewed the documents is
4 contradicted by the fact that they've questioned our
5 witnesses about those documents.
6   So unfortunately, I don't have enough
7 information from Ms. Benassi about the remedy she's
8 seeking to be able to intelligently comment on it at
9 this time.
10   THE COURT: All right. Thank you.
11 Anything further before I hear final words from
12 Datacore on this issue?
13   MS. GORDINA: No, Your Honor.
14   THE COURT: All right. Ms. Benassi?
15   MS. BENASSI: Thank you, Your Honor.
16 First, just to clear the record, I had previously said
17 that we had not reviewed all of the 5,100 documents.
18 There are some that we were able to review and
19 question witnesses on, but we have not been able to
20 review all of them.
21   Second, and importantly, the argument
22 about privileged documents is the first time in the
23 letter that Scale has made such an argument, and it's
24 implausible for three reasons.

Page 23

1   First, during the parties' meet and
2 confer on October 26th, we asked Scale why they
3 produce such a large volume of documents after fact
4 discovery closed, and Scale stated that they went back
5 to look for more information and realized that there
6 were more documents to produce. There was no
7 information about privilege. We also asked them why
8 they didn't give us a heads up, and they did not
9 really provide us with an answer to that.
10   Second, when we looked at the documents
11 at a high level, many of those document appear to be
12 industry publications and advertisements and press
13 releases that are clearly not privileged.
14   And third, Scale has not stated that it
15 withheld any documents on the basis of privilege. So
16 none of the 5,122 documents were identified as
17 privileged. And that's -- yeah, thank you.
18   THE COURT: Okay. All right. Well, we
19 need to move on to the other issues.
20   On this issue, the Court denies the
21 Motion to Compel the extreme relief of precluding
22 Scale from relying on documents produced after the
23 August 31, 2023, discovery cut off.
24   In summary, I find that the Pennypack

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1 factors do not weigh in favor of that extreme relief,
2 and that Datacore on this record has not carried its
3 burden of showing that the Pennypack factors weigh in
4 favor of relief.
5   As I said earlier on the call, the
6 Court certainly disfavors document dumps on the eve of
7 a discovery cut off or belatedly afterwards. But the
8 remedies in each case are case specific, and Datacore
9 hasn't carried its burden of demonstrating that the
10 extreme relief of precluding the documents from being
11 utilized is warranted here, and has in fact indicated
12 that, you know, an interim remedy might be
13 appropriate.
14   But again, the Court is not in a
15 position to grant the interim remedy, because the
16 contours of that have not been developed. And
17 Datacore needs to complete its review of those
18 documents.
19   You've had them in hand now since
20 mid-September. And I recognize, and I'm not faulting
21 the plaintiff for not getting through them as
22 expeditiously as perhaps, you know, you'd hope to
23 given the press of other matters.
24   But that's the nature of litigation.

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1 Litigation teams are spread thin, they're spread thin
2 with this case, with other non-related cases. But
3 that's the nature of all litigation. And the effort
4 here should be on getting through that document
5 production and coming back to the Court if needed to
6 seek additional relief that is specifically contoured
7 around the documents produced in that belated
8 production.
9   In other words, after Datacore gets
10 through these documents, if it feels that there's a
11 necessity to seek another 30(b)(6) deposition of one
12 of Scale's witnesses, that's not a free pass to, you
13 know, button up all loose ends that exist at that
14 time. You know, the relief has to be tailored to the
15 problem. The problem here is a belated document dump
16 after the August 31 cut off. So the relief has to be
17 tailored to that.
18   If you're going to seek another
19 30(b)(6) witness, and I'm not saying on this record
20 that the Court would grant it, because at this point,
21 I know nothing about what the scope of that is, what
22 the topics are, what the length, how many hours might
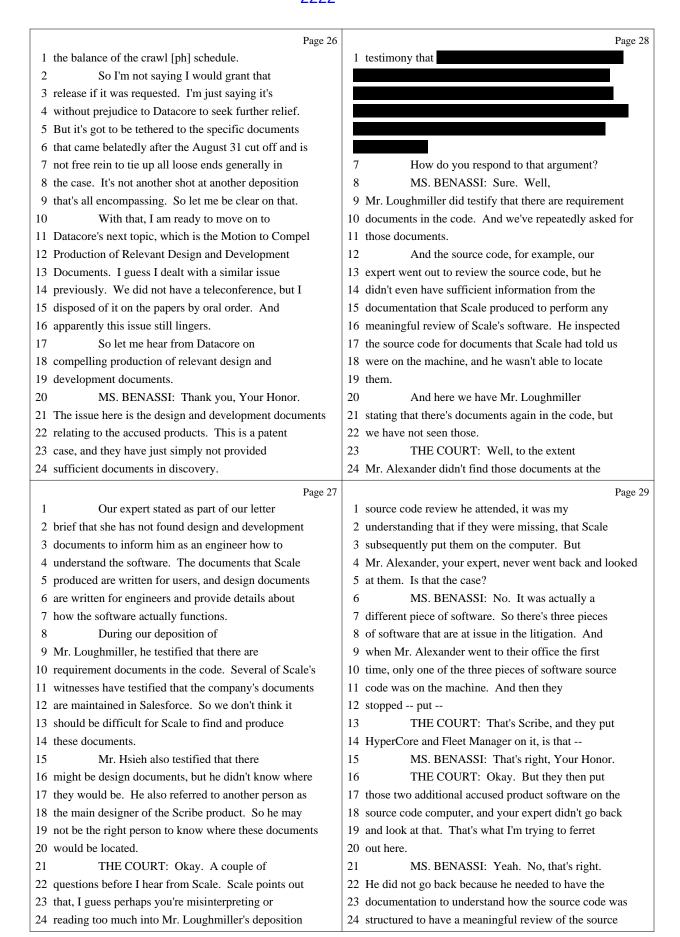23 be needed with that witness, and within what time
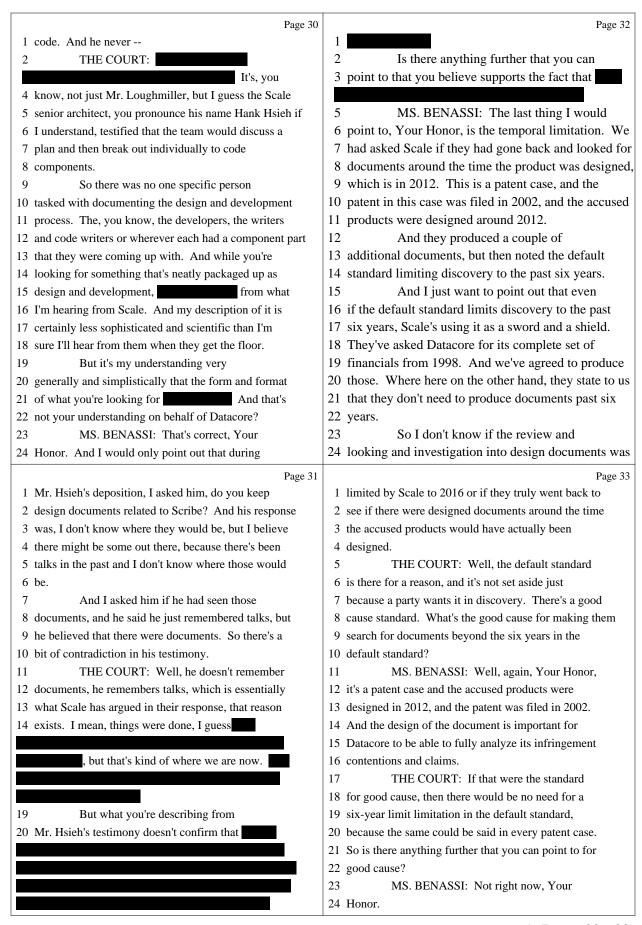24 range it could be accomplished so as not to disrupt

7 (Pages 22 - 25)

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1 the balance of the crawl [ph] schedule.

2   So I'm not saying I would grant that

3 release if it was requested. I'm just saying it's

4 without prejudice to Datacore to seek further relief.

5 But it's got to be tethered to the specific documents

6 that came belatedly after the August 31 cut off and is

7 not free rein to tie up all loose ends generally in

8 the case. It's not another shot at another deposition

9 that's all encompassing. So let me be clear on that.

10   With that, I am ready to move on to

11 Datacore's next topic, which is the Motion to Compel

12 Production of Relevant Design and Development

13 Documents. I guess I dealt with a similar issue

14 previously. We did not have a teleconference, but I

15 disposed of it on the papers by oral order. And

16 apparently this issue still lingers.

17   So let me hear from Datacore on

18 compelling production of relevant design and

19 development documents.

20   MS. BENASSI: Thank you, Your Honor.

21 The issue here is the design and development documents

22 relating to the accused products. This is a patent

23 case, and they have just simply not provided

24 sufficient documents in discovery.

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1   Our expert stated as part of our letter

2 brief that she has not found design and development

3 documents to inform him as an engineer how to

4 understand the software. The documents that Scale

5 produced are written for users, and design documents

6 are written for engineers and provide details about

7 how the software actually functions.

8   During our deposition of

9 Mr. Loughmiller, he testified that there are

10 requirement documents in the code. Several of Scale's

11 witnesses have testified that the company's documents

12 are maintained in Salesforce. So we don't think it

13 should be difficult for Scale to find and produce

14 these documents.

15   Mr. Hsieh also testified that there

16 might be design documents, but he didn't know where

17 they would be. He also referred to another person as

18 the main designer of the Scribe product. So he may

19 not be the right person to know where these documents

20 would be located.

21   THE COURT: Okay. A couple of

22 questions before I hear from Scale. Scale points out

23 that, I guess perhaps you're misinterpreting or

24 reading too much into Mr. Loughmiller's deposition

Page 28

1 testimony that ████████████████████

██████████████████████████████

████████████████████████████

██████████████████████████████

█████████████████████████████

███████████

7   How do you respond to that argument?

8   MS. BENASSI: Sure. Well,

9 Mr. Loughmiller did testify that there are requirement

10 documents in the code. And we've repeatedly asked for

11 those documents.

12   And the source code, for example, our

13 expert went out to review the source code, but he

14 didn't even have sufficient information from the

15 documentation that Scale produced to perform any

16 meaningful review of Scale's software. He inspected

17 the source code for documents that Scale had told us

18 were on the machine, and he wasn't able to locate

19 them.

20   And here we have Mr. Loughmiller

21 stating that there's documents again in the code, but

22 we have not seen those.

23   THE COURT: Well, to the extent

24 Mr. Alexander didn't find those documents at the

Page 29

1 source code review he attended, it was my

2 understanding that if they were missing, that Scale

3 subsequently put them on the computer. But

4 Mr. Alexander, your expert, never went back and looked

5 at them. Is that the case?

6   MS. BENASSI: No. It was actually a

7 different piece of software. So there's three pieces

8 of software that are at issue in the litigation. And

9 when Mr. Alexander went to their office the first

10 time, only one of the three pieces of software source

11 code was on the machine. And then they

12 stopped -- put --

13   THE COURT: That's Scribe, and they put

14 HyperCore and Fleet Manager on it, is that --

15   MS. BENASSI: That's right, Your Honor.

16   THE COURT: Okay. But they then put

17 those two additional accused product software on the

18 source code computer, and your expert didn't go back

19 and look at that. That's what I'm trying to ferret

20 out here.

21   MS. BENASSI: Yeah. No, that's right.

22 He did not go back because he needed to have the

23 documentation to understand how the source code was

24 structured to have a meaningful review of the source

8 (Pages 26 - 29)

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1 code. And he never --
2   THE COURT: ███████████
███████████████████████ It's, you
4 know, not just Mr. Loughmiller, but I guess the Scale
5 senior architect, you pronounce his name Hank Hsieh if
6 I understand, testified that the team would discuss a
7 plan and then break out individually to code
8 components.
9   So there was no one specific person
10 tasked with documenting the design and development
11 process. The, you know, the developers, the writers
12 and code writers or wherever each had a component part
13 that they were coming up with. And while you're
14 looking for something that's neatly packaged up as
15 design and development, ███████████ from what
16 I'm hearing from Scale. And my description of it is
17 certainly less sophisticated and scientific than I'm
18 sure I'll hear from them when they get the floor.
19   But it's my understanding very
20 generally and simplistically that the form and format
21 of what you're looking for ███████████ And that's
22 not your understanding on behalf of Datacore?
23   MS. BENASSI: That's correct, Your
24 Honor. And I would only point out that during

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1 Mr. Hsieh's deposition, I asked him, do you keep
2 design documents related to Scribe? And his response
3 was, I don't know where they would be, but I believe
4 there might be some out there, because there's been
5 talks in the past and I don't know where those would
6 be.
7   And I asked him if he had seen those
8 documents, and he said he just remembered talks, but
9 he believed that there were documents. So there's a
10 bit of contradiction in his testimony.
11   THE COURT: Well, he doesn't remember
12 documents, he remembers talks, which is essentially
13 what Scale has argued in their response, that reason
14 exists. I mean, things were done, I guess ███████
███████████████████████████
███████████, but that's kind of where we are now. ███████
███████████████████████████
███████████████
19   But what you're describing from
20 Mr. Hsieh's testimony doesn't confirm that ███████
███████████████████████████
███████████████████████████
███████████████████████████
███████████████████████

Page 32

1 ███████████████
2   Is there anything further that you can
3 point to that you believe supports the fact that ███
███████████████████████████
5   MS. BENASSI: The last thing I would
6 point to, Your Honor, is the temporal limitation. We
7 had asked Scale if they had gone back and looked for
8 documents around the time the product was designed,
9 which is in 2012. This is a patent case, and the
10 patent in this case was filed in 2002, and the accused
11 products were designed around 2012.
12   And they produced a couple of
13 additional documents, but then noted the default
14 standard limiting discovery to the past six years.
15   And I just want to point out that even
16 if the default standard limits discovery to the past
17 six years, Scale's using it as a sword and a shield.
18 They've asked Datacore for its complete set of
19 financials from 1998. And we've agreed to produce
20 those. Where here on the other hand, they state to us
21 that they don't need to produce documents past six
22 years.
23   So I don't know if the review and
24 looking and investigation into design documents was

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1 limited by Scale to 2016 or if they truly went back to
2 see if there were designed documents around the time
3 the accused products would have actually been
4 designed.
5   THE COURT: Well, the default standard
6 is there for a reason, and it's not set aside just
7 because a party wants it in discovery. There's a good
8 cause standard. What's the good cause for making them
9 search for documents beyond the six years in the
10 default standard?
11   MS. BENASSI: Well, again, Your Honor,
12 it's a patent case and the accused products were
13 designed in 2012, and the patent was filed in 2002.
14 And the design of the document is important for
15 Datacore to be able to fully analyze its infringement
16 contentions and claims.
17   THE COURT: If that were the standard
18 for good cause, then there would be no need for a
19 six-year limit limitation in the default standard,
20 because the same could be said in every patent case.
21 So is there anything further that you can point to for
22 good cause?
23   MS. BENASSI: Not right now, Your
24 Honor.

9 (Pages 30 - 33)

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1   THE COURT: All right. Thank you.
2 I'll hear from Scale on this issue.
3   And Scale, can you specifically address
4 an argument that was made in Datacore's brief, but I
5 didn't really see you hit it on the head directly in
6 the responsive letter briefing. And that is that
7 Datacore argues that responsive documents reside in
8 Scale's Salesforce database, and Datacore wants the
9 responsive documents specifically related to Scribe,
10 HyperCore, Fleet Manager, HC3 System, and FC Platform,
11 which are needed for its experts to analyze
12 infringement. I need a response directly to that,
13 please.
14   MS. GORDINA: Your Honor, with respect
15 to Salesforce, that is a sales tool, not a repository
16 for design documents. So I think there's a bit of a
17 misunderstanding on Datacore's part about what
18 Salesforce is used for. It's a tool where sales
19 people track potential sales opportunities.
20   So if they start talking to a customer,
21 a potential customer, they document their interactions
22 with that customer. If the customer ends up
23 purchasing something from Scale's product offerings,
24 then that gets documented. So it's not a repository

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1 for design documents. So --
2   THE COURT: But it -- has documents
3 that, you know, that's not its main function, but
4 there may be design documents in there if the
5 Salesforce needs to highlight the properties or
6 attributes of the software or whatever. Has it even
7 been searched? I guess more importantly before, you
8 know, all of us here speculating as to what might be
9 found there, has it been searched?
10   MS. GORDINA: The Sales -- so we have
11 not run an ESI search term search against Salesforce.
12 I'm not even sure if that's technically possible. But
13 to the extent there are any documents in Salesforce,
14 for example, a salesperson sends a brochure to a
15 customer, a customer wouldn't be privy to confidential
16 design documents if they were to exist.
17   So the types of documents Salesforce
18 would potentially have within it would be the same
19 types of documents that we've already produced.
20 There's no shortage of documents in our production
21 about how the product operates, customer-facing
22 documentation, brochures, manuals, theory of operation
23 documents, white papers. We've produced all of that.
24   There's nothing on the design side that

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1 we're withholding. We've gone back to our client
2 numerous times at the request of Datacore to ask yet
3 again, is there anything else? Is there anything
4 else? We haven't limited to 2016 or any particular
5 date. We've repeatedly asked and produced everything
6 we could produce. I'm not sure what more Datacore's
7 hoping that we can provide ███████████████
8 ███████████████
9   And I'll just point out, Mr. Alexander
10 spent less than a day looking at the code. And he
11 never returned after we supplemented the source code
12 computer. In over 10 years of patent litigation, I've
13 never seen a source code reviewer spend less than a
14 day on a code review and say, I don't understand it.
15 So it's a little surprising that Mr. Alexander has
16 concluded he doesn't understand the code when he spent
17 such little time on it.
18   But again, we're very short on time, so
19 I'll stop there. I just want to make sure I answer
20 your questions, Your Honor.
21   THE COURT: Thank you. What
22 exactly -- how was the source code supplemented? What
23 was missing during the review and what did Scale do to
24 remedy it?

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1   MS. GORDINA: Well, the Fleet Manager
2 code was added. So Fleet Manager was added for the
3 first time in Datacore's final infringement
4 contentions. They -- they added it as an accused
5 product. And when Mr. Alexander reviewed the code, I
6 believe the one time he reviewed the code, the fleet
7 manager code wasn't on the laptop yet, and we added it
8 within days.
9   But I don't think that's what Datacore
10 is really taking issue with. I think their motion
11 isn't really about -- well, I'll just stop there.
12 I'll answer your questions since we're so short on
13 time.
14   THE COURT: All right. Thank you.
15   Anything further, Ms. Benassi?
16   MS. BENASSI: I would just state that
17 there were multiple Scale witnesses that testified
18 that documents are stored in Salesforce.
19   THE COURT: Understood, but the type of
20 documents are what's likely been produced, which is
21 what Datacore is complaining about. These are all
22 customer-facing documents, user -- end-user documents,
23 which would make sense to store in a sales marketing
24 database.

10 (Pages 34 - 37)

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1   And at this point, well after the
2 deadline for fact discovery, I'd need a little more of
3 a showing of good cause and a reasonable basis for
4 forcing Scale to go back and do search terms against
5 that database, if it's even possible.
6   Anything further on that point to
7 persuade me otherwise?
8   MS. BENASSI: No, nothing further, Your
9 Honor.
10   THE COURT: All right. I'm going to
11 deny without prejudice the Motion to Compel Production
12 of Relevant Design and Development Documents. I'm
13 satisfied based upon Scale's response to this that it
14 has done and -- it has looked for, gathered, and
15 produced everything that is responsive to that
16 category of documents, and that the documents, the
17 sort of design and development documents that Datacore
18 seeks, ████████████████████████
19   I have found that also that there is no
20 good cause, at least on the record made on this call,
21 to compel Scale to go back beyond the six-year
22 limitation in the default standard for discovery and
23 continue to look for such documents based upon the
24 excerpts of the transcripts of the witnesses

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1 Loughmiller and Hank Hsieh.
2   I'm not convinced that either or both
3 of them has confirmed that there is a collection of
4 documents somewhere relating to design and development
5 that was missed or overlooked or not produced for
6 whatever reason. I'm satisfied, as I said earlier,
7 that everything relevant to design and development has
8 been produced. And I think in my view it would be a
9 fishing expedition for me to order Scale to go and
10 look into the Salesforce database for anything more
11 that may be relevant to design and development
12 documents.
13   So on this record, the request is
14 denied without prejudice.
15   Let's move on to the last issue, which
16 is Scale's issue seeking replacement document
17 custodians to search for ESI from Datacore. And I
18 will hear Scale on that point.
19   MS. GORDINA: And Your Honor, just so I
20 know how to tailor my discussion, how much time do we
21 have left? Do we really only have two minutes left or
22 can we go past the hour mark?
23   THE COURT: You can have a few more
24 minutes. Really here, let me ask my questions.

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1 First, I understand and I have seen listed the
2 replacement custodians that Scale is seeking in this
3 case, Alexander Best, Amit Baranwal, Abhijit Dey,
4 David Zabrowski, and Kevin Thimble.
5   First, let me ask a question about one
6 that I call the easy one, Mr. or Ms. Dey, D-E-Y. That
7 seems to be an individual who's not connected in any
8 way with the accused or with the SANsymphony product
9 that's at issue and I guess surrounds part -- is part
10 of the issue that drives this request. Why are you
11 looking for custodial information from that individual
12 if he's got nothing to do with the SANsymphony
13 product?
14   MS. GORDINA: So Your Honor, Mr. Dey
15 was identified based on documentation we saw,
16 specifically an email with a Mr. Bassett who is an
17 identified witness on the paragraph three disclosures
18 and someone we deposed.
19   Mr. Dey appears to be more involved in
20 the overall business of Datacore not specific to a
21 particular product. Again, we're going off of limited
22 information. We don't know what we don't know. We've
23 received just under 1,500 documents total from
24 Datacore in this matter in all of the discovery.

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1   So we could be slightly off when we
2 identified Mr. Dey. Again, it was based on limited
3 information. But we feel that the other four we've
4 identified, their names have come up repeatedly as
5 persons with knowledge, and we don't see Datacore
6 really refuting that.
7   But with respect to Mr. Dey, to be
8 honest, we might have been off. Again, we're just
9 going off of a very limited set of documents that
10 we've received in discovery from Datacore.
11   THE COURT: All right. So let me
12 backtrack a little. You get these disclosures, these
13 paragraph three A disclosures of custodians from
14 Datacore, and that's roughly a little over a year ago
15 in October of early October 2022.
16   And it's my understanding that it
17 doesn't become an issue that five of these custodians
18 lacked any type of ESI. That doesn't become apparent
19 to Scale until October of 2023 after, I guess,
20 reviewing documents and seeing none from five that
21 were on the original list. Is that correct?
22   MS. GORDINA: That timeline is correct,
23 Your Honor.
24   THE COURT: And then some of them

11 (Pages 38 - 41)

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1 include inventors who have no ESI, is that correct?

2   MS. GORDINA: The five individuals of

3 the nine custodians for whom we've now just recently

4 learned Datacore had no ESI, they are all inventors,

5 correct.

6   THE COURT: In fact, three of them have

7 been originally identified in the paragraph three A

8 disclosures have now been withdrawn. Scale is not

9 going to even pursue depositions of them, is that

10 correct?

11   MS. GORDINA: Correct. For three of

12 them, we agreed between the parties, stipulated that

13 if Datacore agrees not to rely on them. Because these

14 individuals are also listed on their initial

15 disclosures, their rule 26 disclosures.

16   So in exchange for Datacore agreeing

17 not to bring those individuals to trial, we agreed not

18 to take their depositions. We were attempting to

19 streamline the issues to take only the important

20 depositions. We've had I think 16 or 17 depositions

21 just in this last month.

22   THE COURT: Understood. And then with

23 respect to Mr. Chen, his deposition, he is an

24 inventor, he had no ESI. And his deposition was

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1 taken, as I understand it, on November 3rd, is that

2 correct?

3   MS. GORDINA: No. Mr. Chen has not

4 been deposed. So I'll just rewind. I think it's

5 beneficial to have some context here. So these

6 inventors were listed as custodians for whom Datacore

7 represented to us that Datacore had their ESI. They

8 also --

9   THE COURT: I understand, and I

10 understand that Datacore never updated its disclosures

11 to say, hey, you know, five of these folks don't have

12 any ESI to produce. And it would have been nice

13 before the close of fact discovery if that had been

14 done, and that would have given Scale an opportunity

15 to say, can we talk about replacing them with other

16 custodians. But and again, you know, I'll talk to

17 Datacore about the timeline of these.

18   But what I'm losing and missing from

19 Scale's argument is why a party who initially lists

20 custodians who turn out later to have no ESI, what

21 role or authority is there that requires that party to

22 substitute others in their place?

23   You know, although the discovery

24 default standard gives each side up to 10 custodians,

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1 you know, as I said with regard to the other issues,

2 these issues are always very case, fact intensive and

3 case specific. Yeah, you can get up to 10. It

4 doesn't mean that if you list 10, all of them are

5 going to have relevant ESI to produce. There may be a

6 smaller subset of them that have ESI.

7   So if nine are listed or eight are

8 listed or ten are listed, and it only turns out three

9 or four of them have relevant ESI, where's the rule

10 that says that triggers replacement custodians

11 automatically?

12   MS. GORDINA: No, Your Honor, there's a

13 nuance there. Our argument isn't that you have to

14 have 10 or you have to have 9. Our argument is we

15 went through the entire course of fact discovery with

16 the understanding that the search terms would be

17 searched against the ESI of these custodians.

18   It's one thing to think that you ran

19 the search terms and there were no hits, there were no

20 relevant documents. It's another thing to say there

21 was nothing to search. Had they told us that there's

22 nothing to search, we would have had our conversation.

23 We would have had a meet and confer, an objective, and

24 said, well, how about you add a few more people?

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1   It's not the case where Datacore is so

2 small that they don't have more than three or four

3 people who qualify as a custodian under the paragraph

4 three disclosures. It's that they basically had

5 filler names on their paragraph three disclosures,

6 names of individuals for whom they couldn't have

7 produced an ESI because now we know they have none.

8 And they never told us.

9   It was only after we pressed the issue

10 and we said, it looks suspicious that you don't have

11 any documents for these five custodians. They came

12 back to us in mid-October and said, oh, we don't have

13 any emails, we don't have any ESI.

14   So they essentially deprived us of

15 being able to get documents and ESI from custodians

16 who would possibly, had they run ESI search numbers

17 against those other custodians, they would have been

18 able to produce some documents. I

19   It's very alarming that Datacore has

20 produced less than 1,500 documents in this case. And

21 over 300 of those documents are printouts from Scale's

22 website, and another 140-some are just slip sheets

23 [ph].

24   So they've produced about 1,000

12 (Pages 42 - 45)

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1 documents, and it's becoming clear how they got there.
2 What they did wasn't in the spirit of the paragraph
3 three disclosures. Their approach to discovery here
4 is not in line with the spirit of what the default
5 standard asks the parties to do. And the parties here
6 agreed to abide by the default standard. We just,
7 now --
8   THE COURT: Yeah, we're not talking
9 about -- again, I will get into the compliance with
10 the default standard with Datacore. That's not what
11 the issue is about. And I understand it's, you know,
12 it's something that is very troubling to Scale that it
13 was handled that way.
14   But Scale's got to show a basis for the
15 relief it's seeking. And I started asking about these
16 witnesses. I'm still not convinced that this
17 individual, Dey, who is an executive officer of an
18 unrelated Datacore division, Perifery, is a custodian
19 who's likely to have relevant ESI. But let's move off
20 him.
21   You've got two 30(b)(6) depositions
22 coming up. Or you have a 30(b)(6) deposition coming
23 up with two witnesses, Zabrowski and Thimble. It's
24 clear in patent litigation that just because certain

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1 witnesses are designated as 30(b)(6) witnesses on
2 behalf of a company, it's not necessarily the case
3 that those are the witnesses who have also been
4 designated as ESI custodians and whose ESI has been
5 searched.
6   You know, again, there's no hard and
7 fast rule that noticing, designating certain witnesses
8 in response to a 30(b)(6) Deposition Notice
9 automatically triggers and makes them records
10 custodians for purposes of a search of their ESI. At
11 least I'm not aware of any. And I think the case law
12 that I found that's not cited in either side's brief
13 is to the contrary.
14   Are you aware of any case authorities
15 that designating a witness is a 30(b)(6) witness
16 automatically requires them to be designated as a
17 records custodian for ESI?
18   MS. GORDINA: No, Your Honor, and
19 that's not quite our argument. Mr. Zabrowski's
20 relevance goes beyond just the mere fact that he was
21 identified as a 30(b)(6) witness.
22   I'll give you a very clear example. At
23 his deposition, he testified that prior to his company
24 ████████████████████████████████████

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1 ████████████████████████████████████
████████████████████████████████████
████████████████████ He couldn't recall
4 details. He couldn't recall who was involved in that
5 analysis, what the results were.
6   Had we had the opportunity to have
7 Datacore run ESI search terms against Mr. Zabrowski's
8 ESI and his emails, we very likely would have found
9 documents relating to that very issue, which is very
10 pertinent to the case. It's very much relevant to the
11 case.
12   So we did our best to identify five
13 replacement custodians who would have relevant
14 information. Again, we might have missed the mark
15 with Mr. Dey, but with respect to Zabrowski, Thimble,
16 it's not merely that they're 30(b)(6) witnesses.
17 Their testimony shows that they have information
18 relevant to the issues in the case. And where their
19 memory stops and they say I can't remember at the
20 deposition, that's where the documents would have been
21 helpful to us.
22   And I think that's the concern, is we
23 missed out on that discovery because Datacore listed
24 people that shouldn't have even been listed. We now

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1 have a declaration from a Mr. Thimble at Datacore
2 saying, oh, we delete documents. So Datacore and its
3 attorneys should have known last October that these
4 five individuals shouldn't even be listed on paragraph
5 three disclosures because there's nothing to search
6 for them.
7   THE COURT: Well, the search terms and
8 such were developed after they were designated,
9 correct?
10   MS. GORDINA: That's correct. Yes.
11 The parties went through the process of identifying
12 search terms after that.
13   THE COURT: How soon were the search
14 terms exchanged and document repositories of ESI, the
15 process for searching them began? Give me a timeframe
16 if you know. You may not know for Datacore, but at
17 least for Scale. When did that generally occur in the
18 litigation?
19   MS. GORDINA: Well, for Scale, we ran
20 the search terms after Your Honor resolved the
21 dispute. You'll recall Datacore wanted to add 19
22 search terms and the rules allow for 10. And after
23 Your Honor ruled that they could only add 10, then
24 there was a timeline in your order for when they were

13 (Pages 46 - 49)

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1 to give us those search terms. We ran the search
2 terms, and that's when we made our large email
3 production in mid-August before the close of fact
4 discovery. So we did it then.
5   We received most of Datacore's ESI
6 production in the last 10 days of discovery.
7   THE COURT: Got it.
8   MS. GORDINA: And over 90 percent of
9 their production was in the last two weeks of
10 discovery.
11   THE COURT: And just very briefly, for
12 these other two proposed replacement custodians,
13 Alexander Best and Amit Baranwal, what's their
14 significance and why do you think they're custodians
15 of relevant ESI?
16   MS. GORDINA: So with respect to
17 Mr. Baranwal, his name came up multiple times in
18 depositions as someone who would have knowledge.
19 Mr. Bassett for a number of questions said, I would
20 contact my boss, Mr. Baranwal, about that. So he was
21 identified because of his knowledge with respect to
22 specifically the SANsymphony. And the same for
23 Mr. Best. His name came up as somebody with knowledge
24 of the product.

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1   And the SANsymphony product is
2 important here because Datacore is making the claim
3 that they practice their product, that these products
4 compete with the accused product, and that that has
5 implications for lost profits and damages.
6   So Mr. Baranwal and Mr. Best both came
7 up. Their names came up in the testimony of other
8 witnesses who said these individuals would know
9 certain things about SANsymphony relating to both the
10 technical and the marketing business side of it.
11   THE COURT: Wouldn't searching the
12 emails of Best and Baranwal likely be cumulative,
13 particularly of Mr. Bassett if not others within
14 Datacore?
15   MS. GORDINA: No, because Mr. Bassett
16 is very much a pure engineer. He doesn't deal with
17 the marketing. He doesn't deal with the business side
18 of the sales for the product. So his documentation,
19 albeit very limited, we've received, you know, a very
20 small production of his documents, it's more focused
21 on the software and the technical side of things as
22 opposed to the business marketing side.
23   THE COURT: Okay. Anything further? I
24 have a question I want to ask the other side. But

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1 anything further from Scale before I do?
2   MS. GORDINA: I don't believe so. I
3 would just again reiterate that we were really
4 surprised and caught off guard when we learned about
5 this just about a month ago in mid-October. It was
6 our understanding that the parties were in good faith
7 doing what paragraph three and ten --
8   THE COURT: And I'm aware of the
9 circumstances. I'll get on that with Datacore. It's
10 been fully fleshed out in the briefing. And we've got
11 some limited time. My time is running --
12   MS. GORDINA: Thank you, Your Honor.
13 Thank you. I'll stop there.
14   THE COURT: -- other matters. Thank
15 you.
16   Let me hear, Ms. Benassi, you know,
17 explain this to me as to how you designate all these
18 folks. And then, you know, well after fact discovery
19 closes, oh, well, we, you know, we just didn't realize
20 that five of them had nothing to produce. How does
21 that happen?
22   MS. BENASSI: Yeah, Your Honor, with
23 respect to Datacore's October 4, 2022, paragraph three
24 disclosures, Datacore identified its six named

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1 inventors of the patent issue because they are the
2 inventors and this is a patent case. When we looked
3 at the patent, we looked at these individuals and
4 thought these are the people that are most likely to
5 have information relating to the development of the
6 inventions disclosed in the patent.
7   The patent was filed in 2002, over 20
8 years ago, and almost no large company would maintain
9 ESI from that era. We identified these custodians on
10 our paragraph three disclosures because we thought,
11 okay, they might have information, they might be
12 relevant individuals to depose, they might recall
13 something. And we didn't know at the time if there
14 was going to be any other documents stored in any
15 other repository.
16   What Datacore did was it collected
17 documents from all locations where relevant
18 information might be found and it ran its search terms
19 on those documents. And that included collecting
20 documents from document repositories, shared sites,
21 OneDrive, the engineering databases.
22   This also included ESI from Nick
23 Connolly, who's the chief architect and co-founder of
24 Datacore, who's been identified by many fact

14 (Pages 50 - 53)

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1 witnesses, if not all, as the main developer of the
2 invention disclosed in the patent. There's literally
3 no other locations where information relating to the
4 asserted patent might be stored, and we've produced
5 all responsive documents.
6   So there may be documents that these
7 inventors wrote and put on a shared drive, and all of
8 those documents were searched for the inventor's
9 names, for the subject matter. Everything's been
10 produced.
11   With respect to the other point I
12 wanted to make, Datacore and Scale reached an
13 agreement in August at Scale's request that Scale
14 would not depose four of the six inventors if Datacore
15 agreed not to rely on them at trial. Now, we agreed
16 to three. We were on the fence about Chen. Chen has
17 since not been deposed in this case. So even back in
18 August, Scale decided to forego the depositions of
19 these inventors.
20   At no point until last month did Scale
21 seek to have the proposed custodians included in
22 Datacore's ESI disclosures, and discovery's been
23 closed for almost three months. With respect to --
24   THE COURT: Yeah, but you know, you've

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1 made the same arguments on your motion to compel on
2 behalf of Datacore against them about a document dump.
3 They're saying that most of these documents came in,
4 I'm not necessarily saying that Datacore dumped them
5 on them, but the majority if not all of the relevant
6 documents from Datacore were produced very close to
7 the eve of the close of fact discovery in August. Is
8 that not the case, they weren't produced in June,
9 July, and August?
10   MS. BENASSI: Your Honor, it goes back
11 to the nuance again. Scale's initial discovery
12 request related to the patent. And the documents we
13 produced back in May when we ran our search terms were
14 related to the patent. It wasn't until August 1st
15 that Scale served its second set of discovery requests
16 that sought information on SANsymphony, the product.
17 We produced all of those documents timely before the
18 close of fact discovery.
19   THE COURT: In producing them, it
20 didn't occur to you that, you know, at that point, you
21 still hadn't produced anything from five of the
22 custodians that you had made or put on your list a
23 year prior, or at least August of 2022? In all of
24 these productions, it's not occurring at all to

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1 Datacore, gee, we're not getting documents from these
2 others, we better update our list of paragraph three A
3 custodians?
4   MS. BENASSI: Well, there was no need
5 to update the custodial list. All of the documents
6 relating to the invention, the invention that's led to
7 the patent, have been produced.
8   And you know, with respect to the
9 proposed custodians that Scale listed in its letter,
10 none of those people have non-duplicative information
11 that's relevant to the claims and defenses in this
12 litigation. I mean, at issue --
13   THE COURT: Yeah, you could argue that,
14 but there's no measuring stick to determine that. I
15 mean, not that I doubt your arguments. You're an
16 officer of the court and I accept your arguments.
17   But you know, Scale is in a position
18 now where all, you know, it was going forward with the
19 litigation at least since October of 2022 believing
20 that the custodians listed, all nine of them, had
21 discoverable ESI, and then it turns out that the
22 majority of them, five out of the nine, don't. And
23 didn't learn of that in time within the discovery
24 period to do anything about it. Only learned it by

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1 going through the documents that were produced.
2   In any event, you know, I don't know
3 think that's going to solve the problem. But if you
4 have a response to that, I'll hear it. Because I do
5 have one important question that I want to make sure I
6 ask and hear your response before I make a ruling on
7 this and before I truly have to go in five minutes or
8 so.
9   MS. BENASSI: Yes, Your Honor. Thank
10 you. So Scale had notice of Datacore's paragraph
11 three custodian since October 2022, and they never
12 objected to the custodians that the CEO, the CFO, the
13 Vice President of Product Development, the Director of
14 Product Management, and the GM should be listed as
15 custodians. Not once.
16   The custodians that are on the
17 paragraph three disclosures are our inventors, and
18 those inventors would have information relating to the
19 patent. The proposed custodians do not have any
20 information relating to the asserted patent.
21   And with respect to the depositions of
22 Mr. Bassett and Nikolov, all of Datacore's witnesses
23 have provided fulsome, substantive responses. There
24 wasn't one question they couldn't ask.

15 (Pages 54 - 57)

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1   And I'll also point again to a nuance
2 that counsel had just brought up with Mr. Baranwal.
3 She said his name came up multiple times in Bassett's
4 depo, but that's misleading, because they were asking
5 Mr. Bassett questions relating to what's Datacore's
6 policy related to document retention? He didn't know
7 what the policy was related to document retention. He
8 said he didn't know. And then they said, well, who
9 would you ask? And he said, I probably just ask my
10 boss, Mr. Baranwal.
11   So he answered all substantive
12 questions relating to SANsymphony. And with respect
13 to Mr. Best, I'll quickly just say that, I mean, he
14 was asked questions, who else knows the product? Who
15 else knows the product besides you? And so --
16   THE COURT: That's fine. And I don't
17 doubt your representations about what was said in
18 deposition. But let me further tweak that argument
19 with you.
20   This dispute over adding these five
21 additional custodians has been fermenting so to speak
22 since early October. Within that time, from the time
23 this dispute, you know, arose and the parties
24 discussed it until now, end of November that we're

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1 having this hearing, did Datacore at any time attempt
2 at a minimum to run a hit count on running the search
3 terms against the ESI of these custodians that Scale
4 is pushing for? So that the Court and Scale, all of
5 us, has some sense of how many hits are on those
6 search terms for each of these custodians.
7   And that is often very helpful to the
8 Court in resolving these types of issues, where hit
9 with a request to search the records of these new
10 custodians who had not been previously searched.
11   MS. BENASSI: Sorry, Your Honor, just
12 to make sure I understand what you're asking --
13   THE COURT: Did you run a hit count in
14 each of these proposed five custodians? That's
15 Baranwal, Dey, Zabrowski, Thimble, using the search
16 terms that the parties agreed on that you ran against
17 the other original custodians?
18   MS. BENASSI: Okay. So you're asking
19 if we collected the emails for these proposed
20 custodians and ran the search terms on them?
21   THE COURT: Yes, if you ran hit counts.
22   MS. BENASSI: We have not, Your Honor.
23   THE COURT: The idea with the universe
24 that is no way to determine I guess, right?

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1   MS. BENASSI: That's correct, Your
2 Honor.
3   THE COURT: All right. Anything
4 further before I hear brief rebuttal from Scale?
5   MS. BENASSI: I would just reiterate
6 that the information that they would seek from these
7 proposed custodians is duplicative of what has already
8 been produced.
9   With respect to the SANsymphony
10 product, Datacore identified its vice president of
11 software engineering, its director of engineering, and
12 its senior software engineer for all technical aspects
13 of SANsymphony. And Datacore search their ESI as well
14 as all, again, document repositories. And Scale has
15 deposed all of these witnesses. They provided
16 substantive fulsome responses. There's not been any
17 issues with any of their depositions.
18   And with respect to damages, Datacore
19 produced its annual financial statements, including
20 R&D costs, revenue costs, margins, units sold. And
21 Datacore further conceded to produce data on a monthly
22 basis and produce all of his audited financials going
23 back as far as it maintains that information.
24   One last note I would say is besides

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1 our P27 [ph] and 28, which have been resolved before
2 this Court, there are no other RFPs that Scale has
3 asserted are at issue, has found any deficiencies with
4 in terms of Datacore's document production.
5   THE COURT: Very well. All right.
6 Final words from Scale, please.
7   MS. GORDINA: Thank you, Your Honor.
8 Thank you, Your Honor. Very briefly, I was listening
9 very carefully to Ms. Benassi's argument, and with all
10 due respect, I think it misses the point. The point
11 here isn't we want them to produce documents that have
12 been deleted from the inventors. We accept that these
13 documents don't exist. We accept that there's a
14 limited number of inventors and they don't have ESI
15 for them. So we're not saying let's find five people
16 who will have that information. We accept their
17 representation that it's gone.
18   What we're saying is they filled in
19 slots on their paragraph three disclosures with names
20 of people for whom they could not have produced
21 anything relevant. And that deprived us of discovery.
22 And had we known that, we could have had a
23 conversation about who else could have filled the
24 spot.

16 (Pages 58 - 61)

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1   So it's not a, let's try to find people
2 who have information about the invention. That's with
3 the inventors and it's gone. We're saying as a whole,
4 looking at all the issues in the case, there are other
5 custodians at Datacore with information relevant to
6 the issues.
7   And we just simply did not get
8 discovery for them because of the way Datacore
9 approached this ESI disclosure and production
10 procedure. And it wasn't what we had understood. And
11 there was no way for us to know until we finally
12 pressed the issue and they told us about a month ago,
13 we don't have anything.
14   So that's really the issue. It's not a
15 one for one, let's find people who could fill the
16 shoes of the inventors. And that's what Ms. Benassi
17 was really focused on. That's not the point. As a
18 whole, there are other people at Datacore, other
19 custodians with information relevant to the case. And
20 the example I gave about ███████████████
█████████████████████████████
███████████████
23   The documents of those custodians would
24 have been really helpful. They would have been

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1 relevant and we were entitled to them. And we missed
2 out on that. And that's the problem here. It's not
3 resolved by just doing nothing, which is what I'm
4 hearing Datacore is proposing, let's do nothing. We
5 don't think that that's the remedy here.
6   THE COURT: Is anything missing that is
7 critical to the case that you haven't gotten to date
8 through discovery? Because let's face it, there could
9 always be one or two or three more custodians that a
10 party wishes you could add to the list. But that's
11 why the Court puts the brakes on a limit of 10 absent
12 good cause.
13   Because you could keep searching and
14 searching and searching, and arguably everyone
15 connected with the company at a particular time and
16 associated with a particular product line arguably has
17 relevant information. But you know, there has to be
18 some management of the scope and the volume of
19 discovery.
20   MS. GORDINA: Of course.
21   THE COURT: And unless there's
22 something on this record that demonstrates that
23 Datacore's production to date has been so woefully
24 inadequate that Scale's ability to prepare a defense

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1 to its claims of infringement and/or damages claims is
2 just so jeopardized by this, you know, deficient
3 discovery, that it's worthwhile then to open the door
4 up to five additional custodians.
5   MS. GORDINA: Your Honor, I'll give you
6 a very clean example. One of the claims that Datacore
7 is making is that their products compete head to head
8 with the accused product of Scale and that they've
9 lost sales. They've lost profits. There's a void of
10 documents relating to that issue. We don't see
11 anything relating to the competition between the
12 companies, how it was tracked, whether sales were
13 lost.
14   Ther is absolutely -- I mean, their
15 production is woefully deficient. We don't see
16 evidence about how the products technically operate
17 and how they practice their own patent. We don't see
18 any information about how these companies allegedly go
19 head to head and how Datacore loses sales. And that's
20 a core piece of their damages argument in the case.
21 And that's just an area where we don't have anything.
22   And it's now becoming clear why we
23 don't have anything. It's because people who would
24 have had information related to that issue, their

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1 documents simply weren't searched. And of course,
2 there's a limit. You can't search everything. That's
3 why the rule of limit to 10.
4   And our position isn't you must have 10
5 or you must have 9. There's no magic number. But
6 we're just saying that we missed out on relevant
7 discovery in this case because of the way Datacore
8 approached discovery under the default standard. We
9 don't think it was what the rules intend or what the
10 parties, you know, had agreed to early on in the case
11 when we said we'll follow this procedure. I'll stop
12 there.
13   THE COURT: Very well.
14 Anything -- well, I think I've heard enough argument.
15   On this record, I'm not satisfied that
16 there is a sufficient reasonable basis and/or good
17 cause to add five replacement custodians. Had Scale
18 been more targeted and focused in picking one or two
19 from these five and tying it in to the claims at issue
20 in this litigation and why a search far outside the
21 fact discovery deadline would be essential to Scale's
22 ability to litigate its defenses to Datacore's claim,
23 the Court may have been more inclined to find a
24 solution.

17 (Pages 62 - 65)

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1   But on this record, it's very thin. It
2 hasn't been tethered to any of the claims or defenses
3 being litigated. That's not to say, however, that the
4 Court condones the way these custodians were
5 identified and handled. As I mentioned, with respect
6 to the document dump, there are better ways of
7 litigating that would decrease the likelihood of
8 having these types of discovery issues coming before
9 the Court. But we're here now and there's nothing we
10 can do to correct the past. I can only go by the
11 record that's made before me.
12   And while I may be hearing information
13 on this call that might weigh slightly in favor of
14 maybe selecting one or two of these custodians, it's
15 outside of the arguments that were briefed. And so
16 I'm hearing these arguments for the first time on this
17 call. I don't know that they've been vetted with the
18 other side.
19   I can't really tell that there's been a
20 meaningful meet and confer and an attempt to reach a
21 compromise resolution, or at least for Scale to ask
22 Datacore, hey, we think that, for example,
23 hypothetically, Mr. Baranwal, was mentioned so
24 frequently by Mr. Bassett, can you least collect his

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1 ESI and run search terms against it so we would have a
2 sense of the universe of hit counts that come up when
3 you do that?
4   There's nothing in front of the Court.
5 I'm, you know, trying to resolve this issue in a
6 complete vacuum based on, you know, a history of, you
7 know, perhaps manners of litigating that could have
8 been better and alleviated this problem had better
9 steps been taken months ago to inform that the
10 custodians originally designated weren't all the most
11 apt custodians for this case.
12   But on this record, I deny the motion
13 to compel Datacore to collect, search, and produce ESI
14 from the five replacement custodians.
15   But again having said that, as these
16 depositions go forward, certainly there are
17 depositions yet to be taken. If these witnesses are
18 questioned about having and/or maintaining any
19 documents that may be supportive of or may highlight
20 or be background information for the deposition
21 testimony that they're giving, and it turns out that
22 the particular witness has never had their ESI
23 searched, you know, that may form a basis for coming
24 back.

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1   But I'm not saying I would grant it,
2 particularly at this stage in the litigation where it
3 is so advanced, and now the parties are on the eve of
4 expert discovery, which opens a completely different
5 phase of the case.
6   As the parties are aware, Judge
7 Williams indicated that he was keeping this case on
8 track for an August trial. He gave the parties some
9 flexibility to make some minor adjustments as needed
10 for witnesses and for the schedules of counsel. But
11 beyond that, this case is staying on track for an
12 August trial and the schedule will be maintained.
13   And that is paramount in the Court's
14 case management practices here. And also factors into
15 how I've resolved these disputes today, and how I may
16 view any future disputes that arise out of the
17 depositions yet to be taken and/or the expert
18 discovery phase.
19   So those are my rulings. I usually
20 allow the transcript to serve as the record of the
21 Court. And in this case, I will partially do that.
22 But I think it may be helpful to the parties to have a
23 written order as well simply memorializing the Court's
24 rulings and giving some basic rationale for each of

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1 them. And I will do that promptly as well.
2   With that, does the plaintiff have
3 anything further that the Court needs to address at
4 this time?
5   MS. BENASSI: No. Thank you, Your
6 Honor.
7   THE COURT: All right. Anything
8 further on behalf of the defendant Scale?
9   MS. GORDINA: Your Honor, I'll just
10 mention some of the discussion today regarding the
11 deposition testimony, for example of Mr. Zabrowski,
12 that deposition took place after we filed our motion.
13 So some of the information that I provided in my
14 argument today was not available. It did not exist at
15 the time we filed our motion. I just wanted to put
16 that on the record.
17   And then in addition, with respect to
18 the financial documents, I also just wanted to state
19 that we have not received them yet and don't have a
20 date certain for when we will receive them. But
21 assuming that Datacore will produce them in short
22 order, then that issue appears to be resolved.
23   THE COURT: I appreciate that. And I
24 know that things happen in real time, and that you

18 (Pages 66 - 69)

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1 don't often, you know, upon the writing of these
2 letter briefs have everything you need to inform the
3 Court, and I appreciate that clarification.
4   If there are any issues with respect to
5 the matters that had been resolved between the parties
6 and the Court did not have to rule on them, then you
7 can certainly come back to the Court if it's impacting
8 the expert discovery schedule, or any other -- or
9 causing any other concerns with respect to the
10 litigation.
11   And all of my rulings are without
12 prejudice. I recognize that discovery is not a static
13 thing and things may occur during the course of
14 discovery that would cause a party to raise an issue
15 that perhaps did not, you know, seemed as it was
16 resolved.
17   There may be subsequent discovery
18 issues that come up, that tie in with the issues that
19 I've addressed going forward in the litigation, and
20 each side is without prejudice to raise whatever
21 issues in the future it needs to with the Court as
22 appropriate. So let me be clear about that.
23   With that, I thank everyone for your
24 time and for your arguments and for accommodating my

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1 schedule today. And we are concluded. I am
2 adjourning the conference call and disconnecting.
3   (Whereupon, at 1:38 p.m., the
4   proceeding was concluded.)
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1   CERTIFICATE
2   I, ANDREW WEADER, the officer before whom
3 the foregoing proceedings were taken, do hereby
4 certify that any witness(es) in the foregoing
5 proceedings, prior to testifying, were duly sworn;
6 that the proceedings were recorded by me and
7 thereafter reduced to typewriting by a qualified
8 transcriptionist; that said digital audio recording of
9 said proceedings are a true and accurate record to the
10 best of my knowledge, skills, and ability; that I am
11 neither counsel for, related to, nor employed by any
12 of the parties to the action in which this was taken;
13 and, further, that I am not a relative or employee of
14 any counsel or attorney employed by the parties
15 hereto, nor financially or otherwise interested in the
16 outcome of this action.
17   *Andrew Weader*
18   ANDREW WEADER
19   Notary Public in and for the
20   State of Pennsylvania
21
22
23
24

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1   CERTIFICATE OF TRANSCRIBER
2   I, DANIEL O'CONNELL-SANTOS, do hereby
3 certify that this transcript was prepared from the
4 digital audio recording of the foregoing proceeding,
5 that said transcript is a true and accurate record of
6 the proceedings to the best of my knowledge, skills,
7 and ability; that I am neither counsel for, related
8 to, nor employed by any of the parties to the action
9 in which this was taken; and, further, that I am not a
10 relative or employee of any counsel or attorney
11 employed by the parties hereto, nor financially or
12 otherwise interested in the outcome of this action.
13
14   *Daniel O'Connell-Santos*
15   DANIEL O'CONNELL-SANTOS
16
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